TENAGA NASIONAL BHD v. PEARL ISLAND RESORT DEVELOPMENT SDN BHD

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
MOHAMAD ARIFF YUSOF JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: P-02(NCVC)(W)-897-04-2013]
13 JANUARY 2015

LIMITATION: *Accrual of cause of action – Fresh accrual of cause of action – Failure to settle outstanding electricity charges – Whether action time-barred – Whether period of limitation calculated from date call on bank guarantee made or on date of default of payment – Whether encashment of bank guarantee amounted to part payment – Whether gave rise to fresh accrual of action – Whether bank acted as respondent's agent – Limitation Act 1953, s. 26(2)*

UTILITIES: *Electricity – Charges – Default in payment – Execution of deed of settlement to settle amount due and owing – Arrears and outstanding current charges includes connected load charges – Whether deed of settlement null and void – Whether s. 26 Electricity Supply Act 1990 conferred power on appellant to impose connected load charges – Whether s. 29(1) and (2) qualified ss. 26 and 26A – Whether rights and obligations of parties governed by special agreement – Whether imposition of connected load charges ultra vires Electricity Supply Act 1990*

A contract to supply electricity ('the contract') was entered into between the appellant and the respondent for the supply of electricity to the respondent's premises. The respondent also requested that it be supplied with a maximum load of 2270kW and this request was incorporated into the contract. As such, the respondent had to pay the monthly connected load charges ('CLC'). The respondent had secured a bank guarantee from EON Bank Bhd ('the bank') for the sum of RM80,000 to guarantee the payment of the electricity charges. The respondent, however, defaulted in its payment and a deed of settlement was entered into between the parties whereby the respondent agreed to settle the arrears of payments by ten monthly instalments commencing from 24 June 2005. The arrears and the outstanding current charges included the CLC charges as well. The respondent failed to comply with the deed of settlement and as a result, the appellant made a call on the bank guarantee, leaving an outstanding amount of RM527,276.86 as due and payable. The respondent continued to default in its payment and the appellant utilised the deposit from the other accounts of the respondent, leaving the sum of RM510,747.17 as the sum due and owing. Due to the respondent's default in payment, the appellant filed a suit in the High Court and the respondent filed a counterclaim claiming, *inter alia*, the repayment of the sum of

RM80,000 under the bank guarantee as it had been wrongfully demanded upon and received by the appellant. By virtue of s. 6(1)(a) of the Limitation Act 1953 ('the Limitation Act'), it was contended that the appellant's claim was statute barred as it was filed after the expiry of six years. The appellant, however, relied on s. 26(2) of the Limitation Act and argued that the period of limitation should be calculated from the date the call on the bank guarantee was made and the monies credited, *ie*, 31 May 2006 and not the date of default under the settlement agreement, *ie*, 23 October 2005 (being the last day following the 30 days' notice given by the appellant to settle the outstanding sums). Dismissing the appellant's claim and the respondent's counterclaim, the trial judge ruled that the appellant's claim was barred by limitation and that the respondent's counterclaim was without merits. It was further decided that s. 26(2) of the Limitation Act could not assist the appellant since the monies pursuant to the encashment of the bank guarantee did not come from the respondent, *ie*, the person liable or accountable for the debt. Dissatisfied, the appellant filed an appeal and the respondent filed a cross appeal. Relying on *Malaysia Building Society Berhad v. KL Al Dhuha Sdn Bhd & Anor* (*'Malaysia Building Society'*) and *WTK Holdings Bhd v. Foo Sae Heng & Anor* (*'WTK Holdings Bhd'*), the appellant argued that the part payment could be made by another party such as the bank when it honoured the call on the bank guarantee on 31 May 2006. Since the action was filed on 27 February 2012, the appellant contended that the action was not barred by limitation. On the other hand, the respondent argued that the deed of settlement was null and void under the Electricity Supply Act 1990 ('the ESA') when the appellant imposed the CLC which had been included in the computation of the arrears. The issue that arose for consideration was whether the encashment of the bank guarantee amounts to a part payment under s. 26(2) of the Limitation Act, therefore giving rise to a fresh accrual of action.

Held (dismissing appeal and cross-appeal; affirming decision of the High Court)

Per Mohamad Ariff Yusof JCA delivering the judgment of the court):

(1) Section 26(2) of the Limitation Act provides "where any right of action has accrued to recover any debt …the person liable or accountable therefore acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment …". (para 12)

(2) In *Malaysia Building Society*, there was an element of acknowledgment of the debt by the borrower after the expiry of the six years from the accrual of the cause of action in addition to the agreement to allow the acquisition sum to be paid directly to the plaintiff to offset the loan However, these elements were absent from the facts of this instant

appeal and was not an authority for a broad proposition of law that a part payment could be made by any third party for s. 26(2) of the Limitation Act to apply. (para 19)

(3) In *WTK Holdings Bhd*, the part payment was made by an associate company of the borrower and it was decided that s. 26(2) of the Limitation Act could not apply because it was not established on the evidence that the associate company had acted as an agent of the borrower when it paid the lender. On the facts, the bank could not be equated in law as an agent of the respondent in relation to the payment on the call on the bank guarantee. (para 20)

(4) The doctrine of estoppel was applied against the respondent on the basis that the respondent had voluntarily entered into the settlement agreement. Section 29(1) and (2) of the ESA qualified ss. 26 and 26A by expressly providing that there could be a special agreement entered into whereby the rights and obligations of the parties would be governed by this special agreement. Hence, the imposition of the CLC was not *ultra vires* the Electricity Supply Act 1990. Further, the disconnection of the electricity supply to the respondent's premises was lawfully effected with prior notice under the Licensee Supply Regulation 1990. (paras 14 & 17)

(5) The respondent failed to call one Tan Swee Leong who was potentially a crucial witness for the respondent since he signed the settlement agreement on behalf of the respondent. As such, an adverse inference under s. 114(g) of the Evidence Act 1950 was drawn against the respondent for this failure to call a crucial witness who could have either confirmed or denied whether the imposition of the CLC was agreed by the respondent. (para 15)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dan responden telah memasuki satu kontrak bekalan elektrik untuk membekalkan elektrik ke premis responden. Responden juga telah memohon untuk bekalan muatan tinggi sebanyak 2270kW dan permintaan tersebut telah dimasukkan ke dalam kontrak. Oleh itu, responden perlu membuat bayaran bulanan 'Connected Load Charges' ('CLC'). Responden telah mendapatkan satu jaminan bank daripada EON Bank Bhd ('bank tersebut') sebanyak RM80,000 untuk menjamin bayaran elektrik. Responden, walau bagaimanapun, gagal membuat bayaran dan satu surat ikatan penyelesaian telah dimasuki antara pihak-pihak di mana responden bersetuju untuk menyelesaikan tunggakan bayaran melalui sepuluh bayaran ansuran bermula dari 24 Jun 2005. Bayaran CLC juga dimasukkan dalam tunggakan dan bayaran yang perlu dibuat oleh responden. Responden gagal untuk mematuhi surat ikatan penyelesaian dan oleh itu, perayu telah menuntut pembayaran

daripada jaminan bank di mana jumlah yang perlu dibayar selepas itu adalah sebanyak RM527,276.86. Responden masih gagal membuat bayaran tersebut dan perayu telah menggunakan deposit daripada akaun responden yang lain, meninggalkan baki sebanyak RM510,747.17 sebagai jumlah yang masih terhutang. Perayu telah memfailkan tindakan di Mahkamah Tinggi atas kegagalan responden membuat bayaran dan responden pula telah memfailkan tuntuan balas menuntut, antara lain, bayaran semula jumlah RM80,000 di bawah jaminan bank yang dituntut dan diterima dengan salah oleh perayu. Berikutan s. 6(1)(a) Akta Had Masa 1953 ('Akta Had Masa'), adalah dihujahkan bahawa tuntutan perayu dikekang oleh statut memandangkan ia difailkan selepas tamat tempoh enam tahun. Perayu, walau bagaimanapun, bergantung kepada s. 26(2) Akta Had Masa dan menghujahkan bahawa tempoh had masa sepatutnya dikira dari tarikh tuntutan pembayaran daripada jaminan bank dan wang dikreditkan, iaitu, 31 Mei 2006 dan bukannya tarikh kegagalan membuat bayaran di bawah perjanjian penyelesaian, iaitu, 23 Oktober 2005 (tarikh akhir berikutan notis 30 hari yang diberi oleh perayu untuk menyelesaikan jumlah yang masih terhutang). Menolak tuntutan perayu dan tuntutan balas responden, hakim bicara telah memutuskan bahawa tuntutan perayu dihadkan oleh masa dan tuntutan balas responden adalah tanpa merit. Juga diputuskan bahawa s. 26(2) Akta Had Masa tidak membantu perayu memandangkan wang yang diperolehi melalui jaminan bank tidak diberikan oleh responden, iaitu pihak yang bertanggungjawab untuk hutang tersebut. Tidak berpuas hati, perayu memfailkan rayuan ini dan responden telah memfailkan rayuan balas. Bergantung kepada kes-kes *Malaysia Building Society Berhad v. KL Al Dhuha Sdn Bhd & Anor* (*'Malaysia Building Society'*) dan *WTK Holdings Bhd v. Foo Sae Heng & Anor* (*'WTK Holdings Bhd'*), perayu menghujahkan bahawa pembayaran sebahagian boleh dibuat oleh pihak lain seperti bank apabila jaminan bank ditunaikan pada 31 Mei 2006. Memandangkan tindakan difailkan pada 27 Februari 2012, perayu menyatakan bahawa tindakan ini tidak dihadkan oleh masa. Sebaliknya, responden menghujahkan bahawa surat ikatan penyelesaian adalah terbatal di bawah Akta Bekalan Elektrik 1990 ('ABE') apabila perayu mengenakan CLC yang merangkumi pengiraan bagi bayaran tertunggak. Isu-isu yang dibangkitkan untuk pertimbangan adalah sama ada penunaian di bawah jaminan bank merupakan pembayaran sebahagian di bawah s. 26(2) Akta Had Masa, menyebabkan terakrunya kausa tindakan.

Memutuskan (menolak rayuan dan rayuan silang; mengesahkan keputusan Mahkamah Tinggi)

Oleh Mohamad Ariff Yusof HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 26(2) Akta Had Masa memperuntukkan "di mana sebarang hak tindakan telah terakru bagi mendapat kembali apa-apa hutang … orang yang bertanggungan atau bertanggungjawab terhadapnya mengakui

tuntuan itu atau membuat apa-apa bayaran berkenaan dengannya, hak itu hendaklah disifatkan sebagai telah terakru pada dan bukan sebelum tarikh bayaran terakhir …". A

(2) Dalam *Malaysia Building Society*, terdapat unsur pengakuan hutang oleh peminjam selepas tamat tempoh enam tahun dari terakrunya kausa tindakan bersama-sama dengan perjanjian untuk membolehkan jumlah pengambilan dibayar terus kepada plaintif untuk mengimbangi pinjaman. Walau bagaimanapun, unsur-unsur ini tidak ada dalam fakta kes rayuan ini dan bukanlah autoriti untuk proposisi luas undang-undang bahawa pembayaran sebahagian boleh dibuat oleh mana-mana pihak ketiga agar s. 26(2) Akta Had Masa tergunapakai. B C

(3) Dalam *WTK Holdings Bhd*, pembayaran sebahagian telah dibuat oleh sebuah syarikat sekutu peminjam dan diputuskan bahawa s. 26(2) Akta Had Masa tidak terpakai kerana tidak terdapat keterangan untuk membuktikan bahawa syarikat sekutu telah bertindak sebagai ejen peminjam apabila bayaran dibuat kepada pemberi pinjaman. Berdasarkan fakta, bank tidak boleh disamakan dengan ejen responden bagi bayaran jaminan bank. D

(4) Doktrin estopel terpakai terhadap responden atas dasar bahawa responden telah memasuki perjanjian penyelesaian dengan sukarela. Seksyen 29(1) dan (2) ABE mensyaratkan ss. 26 dan 26A dengan memperuntukkan bahawa terdapat perjanjian khas yang dimasuki di mana hak dan tanggungjawab pihak-pihak dikawal oleh perjanjian khas tersebut. Oleh itu, pengenaan CLC bukanlah *ultra vires* Akta Bekalan Elektrik 1990. Tambahan lagi, pemutusan bekalan elektrik ke premis responden telah dilakukan secara sah dengan notis awalan di bawah Peraturan-Peraturan Bekalan Pemegang Lesen 1990. E F

(5) Responden gagal memanggil seorang bernama Tan Swee Leong yang merupakan saksi penting yang telah menandatangani perjanjian penyelesaian bagi pihak responden. Oleh itu, anggapan bertentangan di bawah s. 114(g) Akta Keterangan 1950 telah dibuat terhadap responden atas kegagalan memanggil saksi penting ini untuk mengesahkan atau menafikan sama ada pengenaan CLC telah dipersetujui oleh responden. G

Case(s) referred to:

Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd [1982] QB 84 ***(refd)*** H

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Malaysia Building Society Berhad v. KL Al Dhuha Sdn Bhd & Anor [2011] 1 LNS 791 HC ***(dist)***

WTK Holdings Bhd v. Foo Sae Heng & Anor [2011] 5 CLJ 433 CA ***(dist)*** I

Legislation referred to:
Electricity Supply Act 1990, ss. 26, 26A, 29(1), (2)
Evidence Act 1950, s. 114(g)
Limitation Act 1953, ss. 6(1)(a), 26(2)

For the appellant - Mah Su-Ling; M/s Shahrizat Rashid & Lee
For the respondent - JJ Chan; M/s Shearn Delamore & Co

[Editor's note: Appeal from High Court, Penang; Civil Suit No: 22NCvC-167-02-2012 (affirmed).]

Reported by Kumitha Abd Majid

JUDGMENT

Mohamad Ariff Yusof JCA:

[1] This was an appeal against the decision of the High Court in Penang which dismissed the claim by Tenaga Nasional Bhd (the appellant) for outstanding sums due from Pearl Island Resort Development Sdn Bhd (the respondent) arising a contract to supply electricity dated 6 June 2001 ("contract") entered into between the appellant and the respondent for the supply of electricity to the respondent's premises, a club and golf course known as Lot 8134, Jalan Relau, Bayan Lepas, Pulau Pinang.

[2] The contract was entered into pursuant to an application for supply of electricity dated 4 January 2001 by the respondent for electricity to be supplied at the respondent's premise, and in this application the respondent had requested that it be supplied with a maximum load of 2,270 kW. This request for the supply of the maximum load was incorporated into the contract. By this contract, the respondent was to pay the monthly connected load charges ("CLC Charges") if the maximum load recorded was less than 75% of the declared load of 2270 kW at the rate of RM8.50 kW.

[3] The respondent defaulted in settling the charges for electricity consumed at the premises. It wrote to the appellant to request for indulgence to pay the charges outstanding (without CLC charges) by 12 monthly instalments. This letter dated 16 August 2004 appears on p. 87, vol. 2, appeal record. A deed of settlement was then entered into on 10 June 2005, whereby the respondent agreed to:

(a) Settle the admitted arrears of payments then due and owing to the appellant amounting to RM463,334.08, by ten equal monthly instalments commencing 24 June 2005; and

(b) With effect from 24 September 2005, to also settle the current monthly electricity charges incurred by the respondent, together with the instalments.

[4] The arrears and the current charges outstanding included the CLC charges as well.

[5] The schedule of payment in the deed of settlement provided as follows:

Payment	Date	Arrears Payment	Current Month
1	24.6.2005	25,000.00	0
2	24.7.2005	25,000.00	0
3	24.8.2005	25,000.00	0
4	24.9.2005	55,500.00	In Full
5	24.10.2005	55,500.00	In Full
6	24.11.2005	55,500.00	In Full
7	24.12.2005	55,500.00	In Full
8	24.1.2006	55,500.00	In Full
9	24.2.2006	55,500.00	In Full
10	24.3.2006	55,334.08	In Full
Total	463,334.08		

[6] The respondent only paid a total sum of RM75,000 for the months of June 2005, July 2005 and August 2005 and thereafter defaulted in making payments as agreed. Consequently, the supply of electricity to the respondent's premises was disconnected on 5 October 2005, after the respondent failed to comply with the appellant's letter dated 21 September 2005 that demanded the respondent settle the accumulated unpaid arrears and current payments which stood at RM531,473.06 as at 21 September 2005, and the subsequent notice to disconnect dated 24 September 2005. The notice to disconnect gave the respondent notice to make payment of an adjusted outstanding sum of RM576,103.76 within 30 days. The respondent did not settle the instalment for 24 September 2005, and its earlier request that it be exempted from paying the CLC charges was rejected by the appellant in the appellant's very same letter dated 21 September 2005.

[7] The respondent had secured a bank guarantee from Eon Bank Bhd for the sum of RM80,000 to guarantee the payment of electricity charges as part of the agreement to supply the electricity to the respondent's premises. The appellant made a call on this bank guarantee on 14 February 2006, and the sum of RM80,000 was then credited into the respondent's account with the appellant on 31 May 2005, leaving an outstanding amount of RM527,276.86 as due and payable.

[8] A notice of demand for the outstanding amount was issued on 30 July 2008 to the respondent. When the respondent failed to respond, the appellant then utilised the deposit of RM13,219.47 and RM3,310.22 from the other

accounts of the respondent, leaving a total outstanding amount due and owing by the respondent to the appellant of RM510,747.17. That was the amount claimed by the appellant in this suit.

[9] The appellant instituted this action on 28 February 2012. The respondent argued the appellant's claim was statute barred as it had been filed after the expiry of six years applicable for contractual claims under s. 6(1)(a) of the Limitation Act 1953. It was also alleged by the respondent that the appellant had acted wrongfully and in contravention of the relevant regulations (the Licensee Supply Regulations 1990) by disconnecting the electricity to the premises and that the deed of settlement entered into was null and void, being *ultra vires* the powers of the appellant under the Electricity Supply Act 1990 ('Act 447') when it imposed the 'connected load charges' which had been included in the computation of the arrears.

[10] The respondent filed a counterclaim against the appellant claiming *inter alia*:

(a) Refund of the instalments of RM75,000;

(b) The repayment of the sum of RM80,000 under the bank guarantee which the respondent claimed to have been wrongfully demanded upon and received by the appellant;

(c) RM16,529.69 being the deposit sum alleged to have been wrongfully appropriated by the appellant;

(d) A sum of RM75,000 alleged to be the costs of operating and maintaining an alternative generator for supply of electricity to the premises allegedly incurred by the respondent, after the electricity supply to the premises was disconnected by the appellant;

(e) Refund of RM150,000 being a further deposit paid by the respondent to the appellant on 6 June 2001 for obtaining connection of electricity supply to the premises; and

(f) Interest.

[11] The learned High Court Judge dismissed both the appellant's claim and the respondent's counterclaim with costs to be borne by each party. In dismissing the appellant's claim in the High Court, the trial judge agreed with the contention of the respondent that the claim was barred by limitation, but dismissed the counterclaim as being without merits.

[12] The appellant had argued that the period of limitation should be calculated from the date the call on the bank guarantee was made and the monies credited, namely 31 May 2006, and not the date of default under the settlement agreement – 23 October 2005 – being the last day following the giving of the 30 days' notice to settle the outstanding sums by the letter of 24 September 2005 ("Notis Pemotongan Bekalan Elektrik"). The appellant relied on s. 26(2) of the Limitation Act 1953, reading:

(2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable accountable therefore acknowledges the claim **or makes any payment in respect thereof**, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment ... (emphasis added)

[13] The learned trial judge limited the application of this provision to situations where the "part payment" was made by the defendant itself, not by virtue of a call on the bank guarantee, holding:

After having given anxious consideration to the submission of plaintiff's Counsel, I was of the view that s. 26(2) was of no assistance to the plaintiff in the circumstances obtaining here in this case. The monies pursuant to the encashment of the Bank Guarantee did not come from the defendant (person liable or accountable for the debt). It was trite that a Bank Guarantee of the nature here ... was a separate and independent contract between the plaintiff and the Bank only and as provided therein the Bank was to pay within seven days of receipt of the relevant notice of default. The plaintiff was entitled to enforce this contract of guarantee (or indemnity, in a sense) without reference to the Defendant ... (at pp. 32 to 33 of the Grounds of Judgment)

[14] As regards the arguments taken on the counterclaim, the trial judge applied the doctrine of estoppel against the respondent (drawing on the principles laid down in *Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd* [1982] QB 84, as applied by our Federal Court in the oft-cited case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283) on the basis that the respondent had voluntarily entered into the settlement agreement and it could not now be seen as resiling from the position that it had agreed and had led the appellant to believe that it would settle the amounts to the appellant due inclusive of the CLC by the agreed instalments, which it now argued at trial as being *ultra vires* and void on the ground that s. 26 of the Electricity Supply Act 1990 did not confer any power on the appellant to impose and compel its customers to pay CLC. The CLC effectively allowed the appellant to charge the respondent for electricity not actually utilised, whereas it could only impose a surcharge for late payments under s. 26A of the same Act. The trial judge emphasised that the respondent overlooked s. 29(1) and (2) of the Act which qualified ss. 26 and 26A by expressly providing that there could be a special agreement entered into whereby the rights and obligations of the parties would be governed by this special agreement. The imposition of the CLC therefore was not *ultra vires* in the Electricity Supply Act 1990.

[15] The CLC, according to the finding of the trial judge, was not unilaterally imposed but was agreed to by the respondent. The respondent failed to call one Tan Swee Leong who was potentially a crucial witness for the respondent since he signed the settlement agreement on behalf of the

respondent. An adverse inference under s. 114(g) of the Evidence Act 1950 was drawn against the respondent for this failure to call a crucial witness who could have either confirmed or denied whether the imposition of the CLC was agreed by the respondent.

[16] The respondent also questioned the accuracy of the outstanding charges, but this point merely taken generally and it did not show the particulars of any manifest error to the court. The learned trial judge stated:

> The Defendant, apart from merely asserting that they have not been provided with particulars of the sum claimed, failed to show how the calculations of the sum claimed by the Plaintiff was erroneous. It was always open to the Defendant to attend at the office of the Plaintiff to obtain the necessary details and not make a sweeping allegation that they had sought for but had not been provided with the details (at p. 28 of the Judgment).

[17] In these circumstances, the disconnection of the electricity supply to the respondent's premises was lawfully effected with prior notice under the Licensee Supply Regulations 1990.

[18] In the submission before us in the appeal, the respondent revisited these arguments in its cross-appeal. The appellant, on the other hand, limited its grounds to the issue of limitation, which it advanced as follows:

> (i) did the encashment of the Bank Guarantee by the appellant on 31.5.2006 amount to a part-payment under s. 26(2) Limitation Act 1953, therefore giving rise to a fresh accrual of action; and
>
> (ii) did the Appellant's "delay" in encashing the Bank Guarantee prevent the operation of s. 26(2) Limitation Act 1953.

Although formulated as two grounds, it was evident that a negative answer to ground (i) would effectively settle ground (ii).

[19] In the course of the submissions before us, counsel for the appellant cited two case authorities to support the appellant's contention that the part-payment did not need to be made by the respondent itself, but could be made by another party, such as the bank on the facts of this appeal when it honoured the call on the bank guarantee resulting in the offsetting of the amount payable by RM80,000 on 31 May 2006 when the amount was paid into the respondent's account. Since the plaintiff's/appellant's action was filed on 27 February 2012, it was not barred by limitation. The two case authorities are *Malaysia Building Society Berhad v. KL Al Dhuha Sdn Bhd & Anor* [2011] 1 LNS 791 (a case heard by me as a High Court judge) and *WTK Holdings Bhd v. Foo Sae Heng & Anor* [2011] 5 CLJ 433. We were not persuaded any of these cases supported the appellant's contention. In *Malaysia Building Society Berhad v. KL Al Dhuha Sdn Bhd & Anor*, *supra*, which concerned a default of payment on a loan, the borrower had actually agreed with the plaintiff (the lender) that it would allow a sum of RM1 million to be utilised by the lender to offset the amount outstanding when the sum was

received from Jabatan Alam Sekitar as consideration for an acquisition of part of the charged property. The borrower agreed to allow the lender to receive that sum directly from Jabatan Alam Sekitar for this purpose. The loan had been in default since November 2001. The part payment was made in January 2008. The suit for recovery of the loan was filed in 2010. There was an element of acknowledgement of the debt by the borrower after the expiry of the six years from the accrual of cause of action in addition to the agreement to allow the acquisition sum to be paid directly to the plaintiff to offset the loan. These elements are absent on the facts of this instant appeal, and therefore *Malaysia Building Society Berhad v. KL Al Dhuha Sdn Bhd & Anor*, *supra*, is distinguishable on the facts, and is not an authority for a broad proposition of law that a part payment can be made by any third party for s. 26(2) of the Limitation Act 1953 to apply.

[20] As for *WTK Holdings Bhd v. Foo Sae Heng & Anor*, *supra*, the facts disclose that the part-payment was made by an associate company of the borrower. The Court of Appeal in fact decided that s. 26(2) could not apply because it was not established on the evidence that the associate company had acted as an agent of the borrower when it paid the lender. Thus, if anything this case is an authority for the proposition that part-payment must be made by the defendant himself or by his authorised agent. The bank, on the facts of this instant appeal, could not, in our view, be equated in law as an agent of the respondent in relation to the payment on the call on the bank guarantee.

[21] Having considered the grounds of judgment of the learned trial judge and considered the submissions of counsels before us, particularly in light of the two case authorities referred to earlier, we could not find any appealable error to warrant our intervention. In His Lordship's meticulous judgment, the facts and the law had been correctly analysed. There was no clear error whether of law or in the evaluation of the evidence that warranted any appellate intervention. The High Court was thus correct to dismiss both the plaintiff's claim and the defendant's counterclaim.

[22] Thus, for the reasons analysed above, we were of the unanimous opinion that both the appeal and the cross-appeal should be dismissed. That being so, we further decided that there be no order as to costs. The deposit was ordered to be refunded to the appellant.